SUPREME COURT OF THE UNITED STATES.

No. 225.

HARVEY TERRY, APPELLANT,

VS.

THE MERCHANTS' AND PLANTERS' BANK, AND HIRAM ROBERTS, DEFENDANTS.

Argument for Harvey Terry, Appellant, by D. T. Corbin.

CORBIN & STONE,

SOLICITORS FOR APPELLANT.

Edward Perry, Printer, 149 Meeting St., Charleston, S. C.

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STATEMENT.

The Merchants' and Planters' Bank, a body corporate, under the statutes of the State of Georgia, located at Savannah, Georgia, "by reason of losses arising from circumstances incident to the late war, being unable to pay its just and legal debts," by its stockholders resolved, "that the property and assets of said corporation be assigned to some fit and proper person, to be selected by the Board of Directors, for the benefit of the creditors of said corporation." The Directors subsequently resolved, "that the President be, and he is hereby directed * * to execute and make an assignment of all the property, estate, credits and assets of this corporation to Hiram Roberts, for the use and benefit of the creditors of this corporation, and to fix to said surrender and assignment the common seal of said corporation." Folios 11 and 12.

Thereupon said Hiram Roberts, as President of said Merchants' and Planters' Bank, executed an assignment

to Hiram Roberts "of all the lands, tenements and hereditaments, goods, chattels, merchandise, debts, choses in action, sum and sums of money due, owing or belonging to the said party of the first part." (The Merchants' and Planters' Bank,) "and all securities had, taken, and obtained for the same, and all the estate, right, title, interest, property, and claim of said party of the first part in and to the same, according to a schedule thereof annexed, marked A," * * upon the conditions and trusts, that he shall take possession of the premises; convert same into money; collect the debts, &c., and pay all moneys received by him to the creditors of the Merchants' and Planters' Bank. Folio 11 to 15. Said assignment is dated July 16, 1866.

On the 18th of June, 1869, the Appellant, Harvey Terry, brought his Bill in Equity, in the Southern District of Georgia, "on behalf of himself and all other parties in like condition, who will concur and unite and contribute to the expense of the proceeding," against the Merchants' and Planters' Bank and Hiram Roberts. He alleged that for a valuable consideration, in the regular course of business, he had theretofore obtained twenty-five thousand dollars of the bills of said Bank.

That the Bank had become insolvent before the 18th day of July, 1866, and on that day executed an assignment to Hiram Roberts, purporting to convey to him all the property and effects of said Bank in trust for the benefit of its creditors. That said Roberts on the same day accepted the trust, and took possession of the property assigned to him under the trusts declared in the deed.

That said Roberts had neglected and refused to execute said trust; refused to distribute large sums of money among the creditors of the Bank; neglected to convert into money the property and assets assigned to him; but appropriated the same to his own use, and the use of the Bank and other persons.

Said Bill prayed an account, for an injunction, and for the appointment of a Receiver, to take charge of all the property, effects, and assets of said Bank, to collect and hold the same, and cause a due execution of said trust. Folios 1 to 14.

Subsequently, on the 12th of Nov., 1869, said Harvey Terry amended his said Bill of Complaint, amplifying and more specifically charging dereliction of duty upon said Roberts, in the execution of said trust. Folios 25 to 31.

Subsequently, on the 7th of Jan., 1870, a Receiver, A. N. Wilson, was appointed "to receive, collect, keep and dispose of the property and assets of the said Merchants' and Planters' Bank, under the directions of the Court." Folio 38.

Thereupon said Hiram Roberts, Assignee, turned over and delivered the assets of the said Merchants' and Planters' Bank in his hands, to said A. N. Wilson, Receiver. Folio [illegible]

dant, having was taken judgment the sum enty-nine Folio 61,

presented Court in- assets of the said Bank in possession of the Court, it was ordered that they be by publication called in to prove their claims on or before the first Monday of April following. Folio 66, 67.

On the 29th of April, 1872, Andrew Sloan, Esq., was appointed Master in Chancery in said cause to examine into, take an account, and report upon all the claims of all persons, &c. Folio 68.

Subsequently, on the 19th of May, 1873, the following order was granted in said cause, to wit:

"The testimony not having been closed before the Master in this case, &c., &c., it is *ordered* that the Master do take testimony and report—1. Whether any of the parties who have come in, filed their claims and asked to be made parties Plaintiffs in this cause, have brought suit at law or in equity, either or both, against the Merchants' and Planters' Bank, or against any or all of the stockholders of said Bank, or against any or all of the officers of said Bank, any one or

to Hiram Roberts "of all the lands, tenements and hereditaments, goods, chattels, merchandise, debts, choses in action, sum and sums of money due, owing or belonging to the said party of the first part." (The Merchants' and Planters' Bank,) "and all securities had, taken, and obtained for the same, and all the estate, right, title, interest, property, and claim of said party of the first part in and to the same, according to a schedule thereof annexed, marked A," * * upon the conditions and trusts, that he shall take possession of the premises; convert same into money; collect the debts, &c., and pay all moneys received by him to the creditors of the Merchants' and Planters' Bank. Folio 11 to 15. Said assignment is dated July 16, 1866.

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That said Roberts had neglected and refused to execute said trust; refused to distribute large sums of money among the creditors of the Bank; neglected to convert into money the property and assets assigned to him; but appropriated the same to his own use, and the use of the Bank and other persons.

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Thereupon said Hiram Roberts, Assignee, turned over and delivered the assets of the said Merchants' and Planters' Bank in his hands, to said A. N. Wilson, Receiver. Folio 45.

The Merchants' and Planters' Bank, Defendant, having failed to answer Plaintiff's bill, the same was taken as confessed, on April 29, 1870, and final judgment rendered on the same day, for the Plaintiff, in the sum of *thirty-seven thousand seven hundred and twenty-nine* dollars, on the bills and notes of said Bank. Folio 61, 62.

On the 16th of December, 1870, it being represented that there were others than those before the Court interested in the assets of the said Bank in possession of the Court, it was ordered that they be by publication called in to prove their claims on or before the first Monday of April following. Folio 66, 67.

On the 29th of April, 1872, Andrew Sloan, Esq., was appointed Master in Chancery in said cause to examine into, take an account, and report upon all the claims of all persons, &c. Folio 68.

Subsequently, on the 19th of May, 1873, the following order was granted in said cause, to wit:

"The testimony not having been closed before the Master in this case, &c., &c., it is *ordered* that the Master do take testimony and report—1. Whether any of the parties who have come in, filed their claims and asked to be made parties Plaintiffs in this cause, have brought suit at law or in equity, either or both, against the Merchants' and Planters' Bank, or against any or all of the stockholders of said Bank, or against any or all of the officers of said Bank, any one or

more, or all of said parties, as Defendant or Defendants, upon the same or any other cause of action, since the 18th day of July, A. D. 1866, and to what result have said suit or suits been carried. 2. Whether (if such suit or suits have been brought) any sum or sums of money, if so how much, and from whom, have been collected or recovered upon any of said causes of action or otherwise." Folio 72 and 73.

Under authority of this order, the Master took a large amount of testimony, which is reported, and found from folio 74 to folio 135.

Upon the matters embraced in said order, the Master reports as follows:

"Another fact has given me much trouble, and that is, many of the clients represented by Col. A. W. Stone, and formerly by W. Dougherty, Esq., and now by Mr. Akerman, have received, *upon suits against the stockholders of said Bank, judgments in favor of various bill-holders for large sums on account of their unpaid stock.* The claims of these bill-holders last referred to, have been filed in full, without any credits made or allowed for the amounts received on said judgments and settlements made, and I am at a loss to know how much of the money received from the stockholders on account of said unpaid stock should be credited to each of their said clients. I have, however, attached hereto, in connection with the class of cases just referred to, a statement of the collections made by Messrs. Stone and Dougherty, on account of said unpaid stock; and while I cannot report definitely what credit on the dollar should be allowed on each of their claims, and not permitted to share in the distribution of the assets, yet I report the aggregate of the collections made by them as given to me, and therefore am able to report the aggregate credit to be allowed or given to their claims before distribution, all of which will more fully appear hereafter." Folios 138, 139.

The clients represented by Messrs. Stone and Dougherty (now Akerman,) are twenty-three in number, and the list, with amounts claimed by each, is found at folios 183 to 187, also, folios 196 to 198; and the amount of their several claims proved and *allowed*

by the Master, is found at folios 198 to 200, amounting in the aggregate to $832,115.76.

The Master reports "that the entire collections made by Messrs. Stone and Dougherty and by Mr. Akerman, for their clients, amount in the aggregate to one hundred and ninety-seven thousand six hundred and seventy-two dollars," ($197,672,) and adds: "This money was raised on the suits against stockholders (of the Merchants' and Planters' Bank, folio 191½), on account of their unpaid stock." Folio 192. The list of stockholders, paying this sum, is given at folios 191½ and 192.

The Master further reports, "I see no reason why the clients of Messrs. Stone & Dougherty should be entirely deprived from sharing in the assets of the Bank. I therefore sustain the latter portion of the second objection to this extent, viz.: that Messrs. Stone & Dougherty (or at present Mr. Akerman) must, before sharing in the distribution of the assets of the Bank in the hands of the Receiver, reduce the aggregate amount of their claims by the sum of one hundred and ninety-seven thousand six hundred and seventy-two dollars, ($197,672) this being the amount received by them from the stockholders, and that on the aggregate balance of said claims, after said deduction, they can share in said distribution." Folio 194. The calculation is as follows: $832,115.76 less $197,672.00= $634,443.76. Folio 200.

A list of the suits brought by the clients of Stone and Dougherty and Akerman against the Merchants' and Planters' Bank and the stockholders thereof, is found at folios 210 to 216.

Exceptions to Master's Report.

Harvey Terry, Complainant, filed the following exceptions, among others, to the Master's report:

"*Exception II.* For that said Master, by his said report, certified that upon the twenty-three claims represented by A. W. Stone and A. T. Akerman, (formerly William Dougherty), and aggregating ($832,115.76) eight hundred and thirty-two thousand one hundred and fifteen dollars and seventy-six cents, there had been

collected and received by said Complainants, from stockholders of the Merchants' and Planters' Bank, on account of unpaid up stock held by them, the aggregate sum of ($197,672.00) one hundred and ninety-seven thousand six hundred and seventy-two dollars, and said claimants were, nevertheless, entitled to share pro-rata in the assets of the Bank, now in Court, with other claimants, who have collected and received nothing, after deducting from their aggregate claims said sum of one hundred and ninety-seven thousand six hundred and seventy-two dollars ($197,675.00), whereas said Master should have certified that said claimants should not receive anything in this cause: (1) because this cause was instituted by said Harvey Terry, to secure to himself and others in like condition the benefits of the assignment of the Merchants' and Planters' Bank of July 18, 1866; and said claimants, represented by Messrs. Stone and Akerman, have not accepted said assignment, but rejected the same by proceeding at law, subsequent to said assignment, against said Bank and its stockholders, seizing upon and appropriating to themselves the assets of said Bank; and (2) because said claimants are now, as appears by said Master's report, prosecuting suits at law in this Court against the said Bank and stockholders, to further secure to themselves, in opposition to the purposes of this cause and said assignment of July 18, 1866, the assets of said Bank.

But if said claimants are entitled to receive anything in this cause, it can only be after the creditors, who have accepted said assignment, have received the same proportional amount on their claims as that received by them.

Exception III. For that said Master, by his report, certified that said creditors, represented by Messrs. Stone and Akerman, (lately Dougherty), are entitled to recover, in addition to the amount of bills of said Bank held by them respectively, interest and statutory penalties adjudged thereon; whereas said Master should have certified, in respect to said interest and penalties claimed, said claimants were not entitled to receive anything." Folios 221 to 223.

The Court, on May 13, 1874, overruled said excep-

tion two, and sustained said third exception, so far as respects the allowance of penalties to creditors represented by Stone & Akerman, (Folio 228,) and said report, so modified, was, on the 18th May, 1874, confirmed as the judgment of the Court. Folio 337.

The Court ordered the fund in Court, ($82,770.76,) to be distributed accordingly, (Folio 337) and the clients of Stone & Dougherty (now Akerman) to receive $49,040.72. (Folio 241.) Thereupon said Harvey Terry prayed an appeal on the ground that said decree of the Court of May 13th and May 18th, 1874, are erroneous; that said exceptions to said Master's report should have been fully sustained. Folio 215. Said appeal was allowed in open Court. Fol. 247.

Prior to this final decree in the cause (on May 16th, 1874) said Harvey Terry filed the following petition for the taxation of his costs, to wit:

"That he is the original complainant in this cause, and he filed the Bill of Complaint therein on behalf of himself and all other parties in like condition, who should come in and share the expense of the suit, and by his diligence and at his expense, the fund now in Court was realized and brought into Court. That this fund in Court is, in round numbers, eighty thousand dollars, to be distributed among the claimants now in the cause. That a large number of claimants have appeared and proved their claims in this cause, to wit: one hundred and fourteen in number, aggregating about nine hundred thousand dollars.

Your Petitioner represents that he was at large expense in the initiation of said suit, and has paid large sums of money to his attorneys, as retainers in said cause, on commencing said suit, and been at large personal expense and trouble in connection with the original preparation of said cause, aggregating about two thousand two hundred dollars; and your Petitioner therefore prays, that he may have his costs, attorneys' fees and expenses of suit in said cause as aforesaid, taxed, as between attorney and client, and that the same may be paid out of the fund in Court before the same is distributed, and that he may be awarded therefor the sum of two thousand two hundred dollars, or

such sum as to the Court shall seem just and equitable." Folios 2, 4, 8, and 249.

The Court refused said Petition as to attorneys' fees, and thereupon said Harvey Terry prayed an appeal from said order, refusing the same, and said appeal was allowed. Folio 249.

Assignment of Errors.

1. That the twenty-three claimants' clients, represented by Messrs. Stone & Akerman, (formerly Dougherty), should not have been permitted to share in the fund in Court; because this cause was instituted by Harvey Terry, to secure to himself and others in like condition the benefits of the assignment of the Merchants' and Planters' Bank of July 18, 1866, and said claimants have not accepted said assignment, but rejected the same by proceeding at law, subsequent to said assignment, against said Bank and its stockholders, seizing upon and appropriating to themselves the assets of said Bank; and because said claimants are now prosecuting suits at law in this Court, against the said Bank and its stockholders, to further secure to themselves, in opposition to the purposes of this cause and said assignment of July 18, 1866, the assets of said Bank.

2. If said claimants (clients of Stone & Akerman) are entitled to receive anything in this cause, it can only be after the creditors, who have accepted said assignment, have received the same proportional amount of their claims.

3. The said clients of Stone & Akerman should not have been allowed to add interest to their claims from the date of judgment to date of distribution.

4. The petition of Harvey Terry to have his attorneys' fees in this cause taxed and allowed, as between attorney and client, and paid out of the fund in Court before distribution, should have been granted.

Argument.

The twenty-three claimants, clients of Messrs. Dougherty & Stone, now of Akerman & Stone, should not be permitted to share in the fund realized in this cause,

or if so allowed, it shall only be after Terry and others have received the same amount as they, proportionately on their claims.

1. The deed of assignment of the Merchants' and Planters' Bank, of July 18, 1866, is absolute upon its face, and has no condition whatever attached to it. (Folios 11 to 15.) It was by the stockholders of said Bank intended to cover all the assets of the Bank. They resolved, "that the property and assets of said corporation be assigned," &c., without qualification or limitation. The Directors in carrying out the resolution of the stockholders resolved "that the President be and he is hereby directed * * to execute and make an assignment of *all* the property, estate, credits and assets of this corporation to Hiram Roberts for the use and benefit of the creditors of this corporation."

The President, in carrying out said resolution of the directors, executed an assignment of "all the lands, tenements and hereditaments, goods, chattels, merchandise, debts, choses in action, sum and sums of money due, owing, or belonging to said party of the first part, *and* all securities had, taken, and obtained for the same, and all the estate, right, title, interest, property and claim of said party of the first part in and to the same, according to a schedule hereunto annexed, marked A" * * "in trust to pay all the moneys so to be received by him to the creditors of the said party of the first part, ratably and in equal proportions, according to their several and respective legal priorities."

The validity of this assignment is not questioned. The question has been mooted whether or not it covered and conveyed the amount due to the Bank from stockholders on account of unpaid stock subscriptions? We submit that it does. The resolve of the stockholders and directors covered "all the property, estate, credits and assets of this corporation." The Deed of Assignment recites these resolutions of the stockholders and directors, and in consideration of them, proceeds to convey "all the lands, tenements and hereditaments, goods, chattels, merchandise, debts, choses in action, sum and sums of money due, owing, or belonging to the said party of the first part, *and* all securities had, taken,

and obtained," &c., &c., "according to a schedule hereunto annexed, marked 'A'."

Upon examination of the schedule "A," (folios 15 to 22) it appears that no mention is made of the amount due the Bank from stockholders on account of unpaid subscription of stock, and, therefore, it has been said the assignment did not comprehend it. Marsh, vs. Burrough, 1 Wood's Reports, 469.

(NOTE.—This is one of the cases referred to in the record at folio 213.)

On the other hand, we insist that the language used in the granting portion of the deed is broad enough to convey the unpaid subscriptions of stock, to wit, the words, "sum or sums of money due, owing, or belonging to said party of the first part," and that the words "according to a schedule hereto annexed, marked A," qualify only that portion of the granting part of the deed *following* the words "belonging to said party of the first part," and commencing with the words "and all securities," &c The recitals, as shown in the deed, indicate a clear intention to convey "all the property, estate, credits and assets," (which comprehends unpaid stock subscriptions) and this construction of the deed carries out that intention. A deed should be so construed as to effectuate the intent of the parties. Coverdale vs. Wilder, 17, Pick., 181. "The true inquiry is, what, from the construction of the whole instrument * * was the power or property intended by the parties to be vested in the grantees?" Massot vs. Moses, 3d S. C., New Series, 181.

If this be found the true construction of the deed, then it appears that the clients of Stone & Akerman have been seizing upon and appropriating to themselves a portion of the assigned estate, amounting to $197,672,00, as appears by the Master's Report, (F. 192,) and an additional sum of $52,153.20. as was conceded in the final decree, (Folio 242) making a total of $249,825.20. (NOTE.—It is not stated in the decree, folio 242, that the $52,153,20 was received from various stockholders *on account of their unpaid subscriptions of stock*, but as it appears they received this amount "from various stockholders, *in addition to the*

amounts reported by Andrew Sloan, Special Master," we infer it was received on the same account as that reported by him, viz., subscriptions of unpaid stock.)

But, whether this construction of the deed contended for, be held to be the true one or not, it is too well settled to admit of further discussion in this Court, that the unpaid subscriptions to the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation, and must, in all cases, be dealt with as trust funds are dealt with. Sawyer vs. Hoge, 17 Wall., 620 and 621.

In Upton, assignee, vs. Tribilcock, decided at the

(10 A.)

*Nye vs. Van Huson, 6 Mich., 329.

But we submit that this deed of assignment conveys all the assets of the Bank, whether embraced in the schedule or not. In Platt vs. Lott, 17 N. Y., 478, and in Turner vs. Jaycox, 40 Barb., 164, it was expressly held, that an assignment in trust for the benefit of creditors of all the debtor's property, which was therein stated to be "more fully and particularly enumerated and described in a schedule annexed," passed property not mentioned in the schedule.

The conveyance in this case, in its strongest aspect against us, is of "*all*," the property of the Bank for the benefit of creditors, "according to a schedule thereof, hereto annexed, marked Schedule A."

The word "all" should prevail over a defective description of the schedule, as, the whole instrument being considered, such was the intention.

But should it be found doubtful whether the language in the descriptive part of this deed covers and conveys the unpaid stock subscriptions of the stockholders, we submit that the power of attorney, superadded to the deed, operates as an assignment thereof.

This power of attorney, it will be noticed, is separate and distinct from and makes no reference to, the granting part of the deed. It refers to the "*premises*," and is "*in furtherance of the premises*," which are the recitals, consisting of the resolutions, first, of the stockholders, and then of the Directors of the Bank, "to make an assignment of *all* the property, estate, credits and assets of this corporation to Hiram Roberts, for the use and benefit of the creditors of this corporation."

The granting or descriptive part of the deed is said to be "*in consideration of these premises*," and the power of attorney is said to be "*in furtherance of the premises.*"

and obtained," &c., &c., "according to a schedule hereunto annexed, marked 'A'."

Upon examination of the schedule "A," (folios 15 to 22) it appears that no mention is made of the amount due the Bank from stockholders on account of unpaid subscription of stock, and, therefore, it has been said the assignment did not comprehend it. Marsh, vs. Burrough, 1 Wood's Reports, 469.

(NOTE.—This is one of the cases referred to in the record at folio 213.)

On the other hand, we insist that the language used in the granting portion of the deed is broad enough to

(10 B.)

The power then following is, "doth hereby make, constitute and appoint the said Hiram Roberts its true and lawful attorney, IRREVOCABLE, in his name or otherwise, *and for the trust aforesaid*, to ask, demand, recover, and receive of and from *all* and *every person* and *persons*, *all* and *singular* the property and estate, goods, chattels, wares, merchandise, *debts*, *choses in action*, *sum and sums of money*, and *demands due and owing* or belonging to said party of the first part, and upon all receipts and deliveries in the premises, due acquittances and discharges, in his name or otherwise, to make, &c., and in default of delivery or payment in the premises, to sue," &c., "and to compound and agree for all or any part thereof, and upon such composition," &c., "to make due acquittances, &c."

This power of attorney is broad, full, and comprehensive. It is difficult to see how it could be made more so. The attorney is to collect "for the use and benefit of the creditors of this corporation from *all* and *every person* and *persons*, all and singular the property and estate, * * debts, *choses in action*, sum and sums of money, and demands due and owing or belonging to the Bank."

Now, unpaid stock subscriptions are corporate property, (Hightower vs. Thornton, 8 Ga., 486,) and they are therefore embraced in this power of attorney.

This power of attorney is of itself an assignment of whatever is comprehended by it.

This was so held in Sharpless vs. Welch, 4th Dall., (Pa.) Reports, 279, also in Watson vs. Bagaley, 12 Pa. St. Reports, 164.

In this latter case, speaking of the power of attorney, which is set out, the Court says, "an assignment of a *chose in action* or of a fund need not be by any particular form of words or particular form of instrument." * * Any binding appropriation of it to a particular use, by any writing whatever, is consequently an assignment, or what is the same, a transfer of the ownership; and that it may be effected by a letter of attorney to collect and distribute."

See to same effect 2d Story's Eq. Juris., §1047, and numerous

amounts reported by Andrew Sloan, Special Master," we infer it was received on the same account as that reported by him, viz., subscriptions of unpaid stock.)

But, whether this construction of the deed contended for, be held to be the true one or not, it is too well settled to admit of further discussion in this Court, that the unpaid subscriptions to the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation, and must, in all cases, be dealt with as trust funds are dealt with. Sawyer vs. Hoge, 17 Wall., 620 and 621.

In Upton, assignee, vs. Tribilcock, decided at the present term of this Court, it is said "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution."

In Ogilvie vs. Knox, In. Co, 22d Howard, 387, it is said "the stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to *all* who deal with them."

This fund. in case of insolvency, belongs to all the creditors, not to a portion of them. The liability is to the creditors generally and not to individual creditors. Osgood vs. Laytin 37, Howard's Pr. Rep., 63.

This $249,825.20 is, therefore, a trust fund for the benefit of all the creditors of the Merchants' and Planters' Bank—so by operation of law, (Curran vs. State of Arkansas, 15 H., 308,) as much so as if included in the assignment, and may be pursued by them into whosesoever hands it may come, before or after the dissolution of the corporation, unless it come into the hands of a *bona-fide* purchaser. 2 Story's Eq. Jurisprudence, §1252. Mumma vs. The Potomac Co., 8 Pet., 286.

These creditors, represented by Stone & Akerman, have therefore received and appropriated to their own use a large portion of the assets of the Bank, of which they were only entitled to a *pro rata* proportion with Harvey Terry and others, creditors in the same right

in this suit, and for which they can be held by said Terry and others to account in a proper proceeding.

Story's Eq. Pleadings, S. 106, and note.

David vs. Frowd, 1 Mylne and K., 200.

Gillespie vs. Alexander, 3 Rus., 130.

When, therefore, these creditors seek to be made parties to this suit, and share in the fund in Court, they should account for the funds they have received, and be allowed to share in the fund in Court, only after Terry and others have received therefrom the same proportional amount upon their claims as they have received upon theirs. This is the usual decree. 1 Story's Eq. Juris., Sec. 557.

When said creditors of Stone & Akerman come and ask for equity in this cause, they must be required to do equity. The maxim, "that equality among creditors is equity," is applicable to this case. Osgood vs. Laytin, 37, Howard Prac., 66.

When the Circuit Court in Georgia decreed a recovery in favor of said clients of Stone & Akerman, (Marsh et. al. against Burroughs, et. al.,) stockholders of the Merchants' and Planters' Bank, on account of unpaid stock, "it was suggested that the decree should be based on a settlement and distribution of the fund in the hands of the Receiver," (the fund in this case) but the Court refused to attend to the suggestion, because "this would postpone the Complainants indefinitely, and it seems to be generally conceded that the assets in the Receiver's hands are not sufficient to pay the other creditors." 1 Wood's Reports, 473-4. By this, evidently meaning to be understood, that the creditors pursuing this fund in the hands of the Receiver, were entitled to it, and the creditors before it, pursuing the unpaid subscriptions of stock, were not entitled to it.

2. Again, the twenty-three clients of Stone & Akerman should not be permitted to share in the fund realized from the assignment, because they, by their conduct toward the assignor, have disentitled themselves thereto. They have done this; they have, since the assignment, and since it was brought to their notice, instituted numerous suits at law upon their demands against the Bank, and recovered judgments thereon. (Folios

197, 198, 199 and 210, 212.) Having recovered said judgments, they then, by numerous supplementary suits in equity against the stockholders of said Bank, on account of unpaid stock subscriptions, have compelled them, without reference to the provisions made for them in the assignment, to pay said judgments. (Folios 191½ to 193 and folio 242.)

In the case of Field vs. Lord Donoughmore, 1 Dru & Warr., 227, the learned Chancellor of Ireland, Sir Edward B. Sugden, says, "where a debtor enters into a deed of trust for the benefit of his creditors, it is not absolutely necessary that every creditor seeking for the benefits to be derived thereunder, should actually subscribe the deed; but the Court before it permits a creditor, who has not executed, to take a benefit under such deed, is bound to see that he has performed all the fair conditions of the deed, and if such creditor has taken any step inconsistent with the provisions of the deed, he will be deprived of all advantages arising therefrom." Sugden, ~~learned~~ Chancellor, said, "The principle upon which this Court acts in cases like the present, is no longer in dispute. * * The estates were bound by the trust, and the only question is, has the Plaintiff disentitled himself to the benefits of the trust thus created? But it is not absolutely necessary that the creditor should execute the deed; if he has assented to it, if he has acquiesced in it, or acted under its provisions, and complied with its terms, and the other side expressed no dissatisfaction, the settled law of the Court is, that he is entitled to its benefits The mere fact of his signature is not actually required. But then this Court, in letting in one of a class of creditor to the benefit of such a deed as this, is bound to see that he has performed all its fair conditions. This is a necessary preliminary to the right of such a creditor to participate in the fund."

The object of all such deeds is to protect the estate from being torn in pieces, and this Court, when called upon to effectuate them, is bound in the first instance, to inquire whether the arrangements to protect the estate, which were entered into between the debtor and his creditors, have or not been faithfully performed; and in every case where it finds *any credi-*

tor to have deviated from, and disturbed that arrangement it is bound to deprive him of all benefit under the deed"

The deed of assignment in this case, as before observed, is absolute on its face, without any condition whatever attached to it, and being for the benefit of creditors, the presumption of law is, in the absence of evidence to the contrary, that they accept it. Tomkins vs. Wheeler, 16 Pet., 119. This presumption remains till the contrary is shown. Halsey vs. Whitney, 4 Mason, 206. Wheeler vs. Sumner, Id. 183. Bump on Fraudulent Conveyances, 338. When a trust deed comes to the knowledge of the beneficiaries, they are entitled to accept or reject it. Id, 339, and authorities cited.

This deed of assignment came to the knowledge of all creditors certainly as early as Jan. 11, 1867, when the same was recorded with the Clerk of Court for Chatham Co., Ga., (Folio 21,) and was personally known to the clients of Stone & Dougherty, as it is referred to in their Bill of Complaint, in William N. Marsh et al. vs. Wm. H. Burroughs, filed October 10, 1868. (Folio 213.) See report of case in 1st Wood's Reports, 466.

In Forbes vs. Limond, 4 DeG. M. & G. 315, the Lord Chancellor said, "This, I think, is perfectly certain, that no person can be considered to have impliedly acceeded to a deed of this sort, within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors, as if he had executed it, the principle of the rule being, that if you put yourself in the situation of having the benefit of a deed, you must bear its obligations, although you have not literally executed the deed."

And he further holds, (316,) that the mere registering of their claims by creditors, with the assignee or his agents, but directing the bills to be returned to them, *because there were other persons liable upon them, and from whom the amount of the bills,* or part of it, *might be recovered,* "was not acceeding to the deed at all."

In the case of New England Bank vs Lewis, (8th Pick., 119) the point of the case was, "whether the Plaintiffs had refused the provision made for their

benefit in the deed of trust, and if not, whether sufficient facts appear to amount to a waiver." The Court did not find, as matter of fact, an express refusal of the benefits of the trust deed, (p. 120), and therefore, went on to determine whether the Plaintiffs, by electing to proceed to judgment in their action at law, after the provision made for them in the trust deed, had waived the provisions made in their favor in the trust deed. The Court says, "It is not made a condition of the trust, that the Plaintiffs should discontinue their suit, nor does it appear that the defendants in that suit either expected or wished it to be done. They insisted on their defence to the action, and eventually prevailed. Under these circumstances the Plaintiffs had a right to proceed to trial, with the view of saving themselves from costs. If they had prevailed in their action, and had them elected to rely on the attachment rather than on the provision made for them in the deed of trust, this would have amounted to a waiver and disaffirmance of the trust."

The difference between the case at bar and this case of New England Bank vs. Lewis is, that in the case at bar, the clients of Dougherty & Stone commenced their suits at law *after* the making and publishing of the assignment, and with full knowledge of it, and having obtained their judgments they issued executions on them, and failing to collect them, they ignored the assignment made in their favor and pursued the stockholders, on account of their unpaid stock. In Ward vs. Lewis, 4th Pickering, 522, the Court treated the fact that the plaintiffs had not "attempted to secure their demand in some other way," as presumptive evidence of their acceptance and reliance on the assignment. The Court says, "The Plaintiffs must be presumed to have confided in this assignment, and to have relied on this source of payment, otherwise they would have attempted to secure their demands in some other way."

In this case, these creditors of the Bank did attempt to secure their demands in some other way, therefore, it is clear they did not confide in the assignment, and rely on this source of payment.

We submit, therefore, that these creditors have waived

the provisions made for them in the trust deed, and on account of the course pursued by them against the Bank and its stockholders, the Court is, in the language of Lord Chancellor Sugden, "bound to deprive them of all benefits under the deed."

II. The said clients of Akerman and Stone if allowed to prove their claims at all in this case, should not have been permitted to add interest to their claims from the date of judgment to date of distribution.

From the record it appears that of the clients of Akerman & Stone,

W. N Marsh was allowed upon his claim, interest,	$20,12 38
Frisbee & Roberts was allowed upon their claim, interest,	14,078 98
Hugh McRae was allowed upon his claim, interest,	2,511 00
Scott, Zerega & Co. was allowed upon their claim, interest,	26,137 23
John Young was allowed upon his claim, interest,	23,383 31
L U. B. Scott was allowed upon his claim, interest,	45,660 81
Geo. W. Hatch was allowed upon his claim, interest,	20,912 58
Geo. W. Hatch was allowed upon his claim, interest,	3,364 74
Total	$156,960 83

Folios 199 and 200.

This interest was reckoned from the date of the several judgments up to the day of distribution.

These suits were all instituted at law upon the bills of the Bank, and subsequently to the assignment of the Bank, of July 18, 1866. They were unnecessary to enable the claimants to secure the benefits of this assignment. They could not be used for that purpose. If any suit was necessary to secure the benefits of this assignment, it was a suit in equity, such as the one at bar, to have the trusts of the assignment executed. New Eng. Bank vs. Lewis, 8th Pick., 118. Story's Equity Jurisprudence, Vol. 2, Sec. 1037.

These suits were instituted for the purpose of laying the foundation for subsequent proceedings in Equity against the stockholders, on account of their unpaid subscriptions of stock. See Marsh vs. Burroughs, 1 Wood's Reports, 466.

These parties ought not, therefore, to be allowed interest upon their claims merely because they have chosen to take judgments upon them at law. If so allowed, they will, by a wholly unnecessary act, obtain an unjust advantage and preference over other billholders, who have accepted the assignment and lain by, confiding in its provisions for payment. It will be noticed that said claims by this means are increased by more than one-third of their face value—from $416,000 to $556,000.

This fund was first in the hands of a trustee and then in the hands of the Court, to be administered during the whole period for which interest is charged and allowed by the Court below. The fund is deficient, and can pay but a small per cent. on the claims proven. These claimants, if allowed to come in at all, should be allowed to take nothing by their judgments over and above other creditors. The true and equitable rule is stated in Stephenson vs. Hayward, Precedents in Chancery, 310, "that a creditor, who obtains judgment after the debtor has made a conveyance of his estate for payment of his debts, shall be paid only in average."

Upon the same principle it was held in Coverdale vs. Wilder, 17 Pick., 181, that the Plaintiff might recover costs upon his suit at law to the time of the execution of the assignment, but not those accruing subsequently. The Court adds, "We think the assignment contemplated the extinguishment of certain debts, * * and not the costs which should accumulate by keeping the actions in Court."

This fund is an equitable asset, and it is a general rule that equitable assets shall be distributed equally and *pari passu* among all the creditors without any reference to the priority or dignity of the debts. 1 Story's Eq. Juris., sec. 554, and authorities cited.

III. The application of Harvey Terry made before the

decree of distribution, showing that he instituted this suit for the general benefit of creditors, that he had been at large expense at the inception of the case, and in carrying it on, to wit, $2,200; that by his exertions the fund in Court ($82,770.76) was realized, and praying to have his costs, attorney's fees, and expenses of suit taxed as between attorney and client, and paid out of the fund in Court before distribution, should have been granted. Folios 25, 237, 248.

When a suit has been fairly instituted for the administration of assets, the first payment, after the payment of the costs of the executor, who has not disentitled himself to costs, should be the costs incurred by the Plaintiff in the suit. 2d Danl. Chan. P. & Prac., 3 Ed., 1,498.

Where a bill has been filed for the general benefit of creditors and legatees, and the estate has proved insufficient, the Court has been in the habit of late years, of giving the Plaintiff his costs of suit out of the fund realized by his exertions as between solicitor and client. Id. 1512 and 1513.

In Stanton vs. Hatfield, 1 Keen, 358—a creditor's bill,—the Court directed the costs of the Plaintiff as between party and party to be paid out of the fund, and the extra costs of the Plaintiff, to be paid *pro rata* by all the creditors who partook of the benefit of the suit.

In the case at bar the whole fund belongs to the creditors, and payment of the Plaintiff's costs out of the fund before distribution would in effect be a payment *pro-rata* by all the creditors, as in Stanton vs. Hatfield.

The justice of the Plaintiff's demand is apparent, as it appears that his distributive share in the fund in Court, ($4,924.24), is about half eaten up by his costs and expenses, ($2,200), and the other creditors have done nothing, save to file and prove their claims before the Master. Equity requires that the burden of the suit, the benefit of which all reap, should be borne equally by all; and such have been the decisions of the Courts of Chancery in England and America.

Thompson vs. Cooper, 2d Coll., 90.

Ryers vs. Ross, 4 John Ch., 608.

See the decree of Chancellor Kent in Mason vs. Codwise, 6th John. Chan., 301, where it is declared, "that when a creditor comes in under the general decree, for the creditors to come in and prove their debts before the Master, he is admitted upon the condition of being contributory to the Plaintiff for his proportion of the expenses of the suit."

The force of these authorities was acknowledged in the United States Circuit Court by Judge Kane in *ex parte* Plitt, 2 Wall. Jr., p. 483, and the solicitors' fees ordered to be paid out of the fund then in Court.

This also appears to be the law of Georgia, where this suit originated. In Price vs. Cutts, et al., 29th Ga., 151, the Court holds that a person who collects funds of a debtor for the joint benefit of himself and other creditors ought, when the fund is distributed by a Court of Equity, to be allowed reasonable compensation for the services of himself and lawyers.

CORBIN & STONE,

Solicitors for Appellant.

SUPPLEMENT.

In this case the appellee seeks to justify his course and maintain his right to pursue the unpaid stock of the stockholders and appropriate the same to his own use, independent of the assignment.

After stating his proposition, he says:

"The third proposition holds a creditor perpetually bound by a mistake once made, though the mistake has harmed nobody but himself. If he has once supposed the assignment to be invalid, or has supposed the property in question not to be covered by it, and has therefore proceeded against the property, and it has since been determined by the courts, or otherwise ascertained, that he was in error, he must not, according to this doctrine, accept the correction of his error and stand in relation to the assigned property as if the error had not been committed, but, besides the expenses of his unsuccessful litigation, must lose all part of the proceeds of the assigned property. The law is not so intollerant of the infirmities of human judgment. In Sharples *v.* Welsh, 4 Dall., 279, (Penn. Sup. Ct.,) which is cited by the appellant on another point, the decision was that a creditor who had attached the assigned fund, in opposition to the assignment, might nevertheless, on failure of that effort, recover the share of the fund which the assignment gave him."

But the appellant denies that this is a parallel case now before the court in that respect.

In that case the attaching creditor took no property or assets property belonging to the assignee or belonging to the other creditors of the bank, whereas in the case at bar it is shown by the record (folios 191½, 192) that said appellee took $197,672 in money from the trust fund, (the unpaid capital stock of the bank.) And said appellee received $43,658 in current money, and $64,952 in the bank bills of said bank, from a source not accounted for and to appellant unknown. (Record, folios 241, 242.) Therefore it is presumable that the latter sums were received from the same source. The appellee had in this case increased his principal by the addition

of interest on his several claims, amounting to $156,960, (folios 199 and 200,) since the assignment. If the trust fund assigned July 18, 1866, was for the benefit of all of the creditors of said bank at that date, why should one set of creditors be allowed to pursue at common law the fund, and appropriate the fund, by a common-law proceeding, that is a special trust fund for all creditors of said bank as they existed at the date of the assignment, and other creditors are not allowed interest on their bills?

The appellee, by his course, has not only destroyed said trust fund to the amount of $241,330, assigned for the benefit of the general creditors of said bank, who accepted the assignment, and filed their bank bills and claims in said cause in good faith, but he has done more. He has received $64,952 of the bank bills of said bank in the settlements with its debtors, (folios 241–2,) and has increased his claims, by the addition of interest, the sum of $156,960, making an increase in said claims of the appellee of $221,912 that did not exist at the date of said assignment. The appellant contends that it is only necessary to show these gross irregularities against all of the principles of a suit in equity to insure its correction.

The appellant contends that the principle of law laid down in Pollard v. Bailey, 20 Wallace, 520, should rule this case that a trust fund (assigned or not assigned) is for the benefit of all of the creditors of the corporation, *pro-rata* as they existed at the date of the assignment who accept the benefit of the trust, and any creditor who does not accept the benefit of the trust as made by the deed; disentitles himself to any dividend under the deed.

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If, however, the court disagree with the appellant on that point, then appellant submits that the appellee ought to be postponed from any dividend of the fund in

this cause until all other creditors have received a like dividend *pro-rata* from the fund that said appellee has received on his claims from the collections made on his common law actions.

The appellee is in error in his argument, pages 9 and 10 of his brief, when he says:

"Mr. Terry cannot equitably exclude the appellees from equal participation in the present fund because he gave them no timely notice of his intention to do so, * * * * * * If the appellees had in any way diminished the present fund there would be justice in excluding them to the extent of that diminution. * * * * * * * * * * Mr. Terry has sued out execution and sent the marshal on a general search for property of the Bank.* * * * * * * * * * If a collection from stockholders deprives the collecting creditor of the right to take under the assignment or to postpone him to creditors who have not made collections, Mr. Terry is subject to these disabilities, for he made collections from stockholders to the amount of $5,639.55, folios 132 and 181."

In reply to this last assertion of appellees, appellant submits that his bill was originally a creditor's bill in equity, drawn for the benefit of all creditors in like condition, that upon the court granting a decree upon his claim he issued an execution upon his decree of judgment for the intended purpose of obtaining a prior lien on certain propertys rightfully belonging to the fund (see record, folios 139 and 140, and intended to secure the same to the fund in the cause) but appellant submits that no 'evy or sale of any property was made under his execution on his said judgment, and that no personal collection whatever was made on said judgment from any stockholder or from any fund in the cause.

Appellant admits that he did make a voluntary settlement upon an open claim of Bank bills, not in proof in the cause at the date of settlement, but after filing said Bank bills upon which said settlement was based, credit was given for the sum of money received thereon as shown by the record, folios 132 and 181. The collection was voluntary and the credit thereon duly given.

D. T. CORBIN, *Per T.*

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D. T. CORBIN, *Per T.*

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 225.

HARVEY TERRY, APPELLANT,
vs.
THE MERCHANTS AND PLANTERS' BANK.

ARGUMENT FOR APPELLEES,
BY
A. T. AKERMAN.

R. S. BAYNE, Printer, Critic Building.

Supreme Court of the United States.

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STATEMENT.

On the 20th day of July, 1869, Harvey Terry, the appellant, brought his bill in equity in the Circuit Court of the United States for the Southern District of Georgia against the Merchants and Planters' Bank of Savannah and Hiram Roberts, setting forth that he, Terry, was the owner of a large amount of the bills of said bank, that the bank was insolvent; that on the 18th day of July, 1866, the bank assigned its property, in trust for its creditors, to the defendant, Roberts, by a deed which was made an exhibit to the bill, fol. 11 to 21; that under this assignment Roberts had received money and property convertible into money, and had failed to make due distribution among the creditors.

The prayer was for the execution of the trust, and for discovery, account, injunction, and receiver.

The bill was filed in behalf of complainant and all other

parties in like condition who might concur and contribute to the expenses of the suit.

The defendant, Roberts, answered, and complainant replied.

A decree was rendered in favor of the complainant against the bank, April 29, 1870, for $37,729.00, with interest from that date, and costs, and execution issued accordingly, on which there was a return by the marshal of no property.

In the course of the suit a receiver was appointed, and he collected out of the assigned property, and brought before the court, a fund for its disposition.

There was an order and publication for all creditors of the bank to come in and assert their claims upon this fund.

A master was appointed to report upon these claims, and also to ascertain and report whether any of the claimants had sued the bank or any of its stockholders or officers since the date of the assignment, upon the same or other cause of action, and to what result such suits had been carried; and, if such suits had been brought, what collections had been made upon said causes of action or otherwise.

He made a report, including the testimony taken by him and his conclusions therefrom. To this report exceptions were taken by various parties, some of which were sustained and others were overruled. Among those overruled were two taken by Terry, the appellant, designated as number two, which was wholly overruled, and number three, which was overruled in part. (Folios 221, 222.)

Number two excepted to the decision of the master that certain parties who were represented in court by Stone and Dougherty, and after Dougherty's death by Akerman, were entitled to share proportionably with other bill-holders in the fund before the court, after deducting from their original claims the amounts which they had received from stockholders; the exceptor insisting that said parties should receive nothing from this fund because they had sued the bank and its stockholders after the date of the assignment, and that if

they should receive anything in this cause it should only be after other creditors, who had not proceeded against stockholders, had received on their respective claims the same proportional amount as that collected by said parties from the stockholders.

Number three, so far as overruled, excepted to the decision of the master allowing certain judgment creditors, who were represented by Stone and Akerman, to share in this fund, not only for the amount of their bills but also for the interest adjudged thereon.

A decree was made by the court, May 18, 1874, confirming the report of the master as modified by the decision of the court upon the several exceptions thereto, and distributing the fund accordingly.

From this decree Terry alone appeals, having obtained in the Circuit Court an order allowing him to appeal without joining other parties as appellants, and making the parties represented by Stone and Akerman the only "defendants in said appeal." (Folios 246–7.)

The record also shows that Terry, the appellant, petitioned for an allowance of $2,200.00 for his attorney's fees, personal expenses and costs, out of the fund; which the court refused as to attorney's fees.

The errors assigned by the appellant are:

First. That the court allowed the appellees to share at all in the fund, they having rejected the assignment by bringing suits at law against the bank and its stockholders after the assignment, and "appropriated to themselves the assets of the bank."

Second. That the court allowed the appellees to share in the fund without postponement until the other creditors should have received a proportional amount.

Third. That the court allowed the appellees to add interest on their claims from the dates of their judgments.

Fourth. That the Court refused to allow appellants attorneys' fees out of the fund.

Argument.

1. The appellant's first assignment of error seems to involve these propositions: first, that when a debtor has made an assignment for the benefit of creditors, a creditor forfeits all right under it by thereafter suing the debtor; second, that when an insolvent bank is the assignor, and has stockholders who are liable for its debts, the like forfeiture is incurred by suing them after the assignment; third, that the like forfeiture is emphatically the effect of an attempt by a creditor to make his debt out of the assigned property; and, fourth, that in this case the assignment included the right to collect from the stockholders the arrears of their subscriptions for stock.

We controvert every one of these propositions.

The first may be sound enough in the case of composition-deeds which in terms contain a condition that the debtor shall not be sued, or where a statute has created such a condition; but in other cases no such condition is implied. A creditor may doubt the validity of the assignment. Either in fact or in his honest conception, there may be property subject to the debt not embraced in the assignment. There may be an ulterior liability of some other party, of which the creditor can only avail himself, or can more conveniently avail himself, by first establishing his demand in a suit against the assignor. The claim itself may be disputed, and a direct issue with the debtor may be the best mode of testing it. In all such cases suits may be advisable; and, at most, they are harmless, except to the suing party, who has the costs to pay when the suit is unproductive.

In Coverdale *vs.* Wilder, 17 Pick. 178, the court held that the plaintiff in a pending suit against the assignor did not waive his rights under the assignment by continuing his action in court after the assignment. Says the court, "his continuing it in court may have been for greater security." This

reasoning would equally tolerate the commencement of an action "for greater security."

In Burrill on Assignments, 579, it is laid down that a creditor's demand is not discharged by his coming in under an assignment, except "in virtue of some express stipulation contained in the assignment to which the creditor has become a party or some positive statutory provision." It follows from this that where there is no such stipulation or statute the creditor must remain at liberty to sue the debtor notwithstanding the asasignment; for, proceedings which do not discharge his debt cannot deprive him of his right to put his debt in suit.

The second proposition is even less tenable than the first. A creditor has a right to collect his debt, in part or in all, out of any body who is bound for it. Where, as in this case, there were three resources for the creditors of the insolvent bank, to wit: the property that unquestionably passed by the assignment, the dues by stockholders for unpaid stock, and the liability imposed by the charter on the stockholders for the redemption of the bank's bills, the notion that a creditor cannot pursue the last two without exclusion from the first, is in conflict with the most obvious justice. These three resources were created for the very purpose of multiplying his chances of collecting his debt.

The third proposition holds a creditor perpetually bound by a mistake once made, though the mistake has harmed nobody but himself. If he has once supposed the assignment to be invalid, or has supposed the property in question not to be covered by it, and has therefore proceeded against the property, and it has since been determined by the courts, or otherwise ascertained, that he was in error, he must not, according to this doctrine, accept the correction of his error, and stand in relation to the assigned property as if the error had not been committed, but, besides the expenses of his unsuccessful litigation, must lose all part of the proceeds of the assigned

property. The law is not so intolerant of the infirmities of human judgment.

In Sharpless *vs.* Welsh, 4 Dall., 279, (Penn. Sup. Ct.,) which is cited by appellant on another point, the decision was that a creditor who had attached the assigned fund in opposition to the assignment, might nevertheless, on failure of that effort, recover the share of the fund which the assignment gave him.

In Wurtz *vs.* Hart, 13 Iowa Rep., 515, creditors brought suit in equity to set aside the assignment for fraud, and pending that suit obtained in another court an injunction restraining the assignee from distributing the assigned fund before the end of that suit, on the express ground of their right to share in it if they should fail in their suit to set aside the assignment.

In Jewett *vs.* Woodward, 1 Edwards, Ch. Rep., 195, the creditors who sued the debtor after the assignment (as seems to have been the case, see p. 198) and garnisheed the assignee, were permitted nevertheless to share in the distribution under the assignment, the vice-chancellor remarking, "if one remedy fails the party may oftentimes resort to another."

We meet the fourth proposition with the decision of Mr. Justice Bradley upon the assignment in question in Marsh *vs.* Burroughs, 1 Wood's Rep., 469; with the case of Roberts *vs.* Boylan, 24 Ga. Rep., 40, where an assignment of "all the assignor's property," followed by the specification of certain negroes by name, was held not to include a negro not named, the court saying, "the specification is restrictive of the general words;" with Wilkes *vs.* Ferris, 4 Johns' Rep., 335; with the general rule in Burrill on Assignments, 354, "even where all the debtor's property is assigned in terms, if there be subsequent words of description or a reference to a schedule, as setting it forth particularly, the contents of such clause or schedule will operate to limit the general clause or transfer,

and nothing will pass that is not so set forth or specified," a rule recognized in one of the cases cited by appellant—Nye *vs.* Van Husan, 6 Mich. Rep., 329, on p. 342; by the fact that the parties to this deed did not construe it in practice as including the claim for unpaid stock; and by the further fact that Mr. Terry, the appellant, did not assert this claim in his bill, did not make the delinquent stockholders parties and call on them to pay up, did not charge the assignee with negligence in failing to collect these arrears, and did not, while he was master of this suit, move the court for instructions to the receiver to enforce this claim, or move against the receiver for not having enforced it.

The appellant's argument that the power of attorney in the deed operates of itself as an assignment, and by its comprehensive language carries all the property of the corporation, including the claim for unpaid stock, would be pertinent if the instrument in no other place purported to assign; but where there is an assignment in terms, and the power of attorney is merely auxiliary, the latter will not contract or enlarge the former.

But concede, for the argument, that the claim for unpaid stock did pass by the assignment. What then? Upon that supposition the defaulting stockholders have paid to certain of the appellees what was due not to them, but to the assignee, and could have been made to pay again to the assignee or his successor, the receiver. It does not appear that these payments in any way impeded, or would have impeded, the assignee in collecting the assets of the bank. Upon that supposition we have indeed got money improperly, but not from the bank, or the assignee, or the receiver; we have got it from the unfortunate stockholders who yielded to our illegal demand; and though we might in conscience be bound to return the money to them, it is difficult to see why we should pay it to Mr. Terry, or, what is almost the same thing, let him

have more of the fund in court on account of our illegal acquisition from them.

2. The next error assigned by appellant is that the appellees were permitted to share equally with the other creditors who had received nothing on their claims. He asks that we shall be shut out from this distribution until the other creditors shall have received on their claims as much, proportionately, as we have received from other sources.

Not questioning the maxim that equality is equity, we deny its applicability to the present case.

That maxim is never so applied as to deprive a party of the fruits of his lawful diligence. It is unjust that those who have done nothing but to present their claims under the assignment should have an advantage under the assignment over those who have been at the trouble and expense of ascertaining and suing numerous stockholders and driving them to the payment reported by the master. The appellees have not intercepted a dollar that would otherwise have come into the common fund. They have got what the assignee did not seek, and, as we think, could not have got if he had sought it, and what the other creditors could have got as well as we, if they had taken the pains, and we ought to enjoy it, without losing in another place on account of it.

No doubt the unpaid stock is a trust fund for all the creditors; that is, for all of them who will pursue it at the proper time and in the proper way. The bill of Marsh and others against Burroughs and others was probably so framed that other creditors could come in if they chose, and Mr. Terry might have come in, and perhaps did, for he seems to have received money on these collections; folios 132, 181. Perhaps other stockholders were in default besides those sued in that bill, and Mr. Terry might have proceeded against them.

The appellant's argument assumes that the collections made by appellees were all on account of unpaid stock. This is a

mistake of fact. All the suits against stockholders reported by the master were under the personal-liability clause of the bank's charter. He does indeed say in his report, folio 138, that the suits and collections were on account of unpaid stock; but this was an inadvertance, and is corrected in the exhibit which (folio 268) is made part of the report. Folios 212 to 216 contain a list of the suits, correctly described as under the personal-liability clause of the charter, and it will be seen that the defendants in them are among the persons from whom the collections were made, (folios 74 to 107, and 191–2,) one of whom at least, Rogers, was not in arrears for stock, (fol. 103.)

The personal liability was created by section 15 of the charter (Acts of the General Assembly of Ga., 1853–4, p. 182) in the words following: "The persons and property of the stockholders shall at all times be liable, pledged, and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess."

The collections were made on this liability as well as on account of unpaid stock, and there is no pretense that the right to collect on this score ever belonged to the bank or to its assignee. If it was material to Mr. Terry to distinguish between the two sorts of collections, he should have done so by proof.

We also submit that Mr. Terry cannot equitably exclude the appellees from equal participation in the present fund, because he gave them no timely notice of his intention to do so, though he must have known that they were collecting from these other sources, for he himself reeeived money on such collections; folios 132 and 181.

If the appellees had in any way diminished the present fund there would be justice in excluding them to the extent of that diminution. But they have not taken a dollar from that fund, or prevented a dollar from going to it. The acts for which he would exclude them have not injured him, but have largely

benefited him. They now come in for a share on about $250,000 less than they could otherwise have claimed for, and the other creditors, including Mr. Terry, get the benefit of this reduction. And even if the principles on which the first two assignments of error rest are correct in themselves, the appellant is estopped from assertting them in his case; for he has himself been guilty of the faults which he charges on the appellees.

If an effort to collect the debt from other sources is a forfeiture of the right to partake under the assignment, then Mr. Terry has forfeited that right; for, not content with establishing his claim by decree against the bank, he sued out execution and sent the marshal on a general search for property of the bank; folios 62 to 65.

If a collection from stockholders deprives the collecting creditor of the right to take under the assignment, or postpones him to creditors who have not made collections, Mr. Terry is subject to these disabilities, for he made collections from stockholders to the amount of $5,659.35; folios 132 and 181.

3. Upon the third assignment of error the appellees say that by the law of Georgia all judgments bear interest, all liquidated demands bear interest, and all sums payable on demand bear interest from the time of the demand; Code of 1873, sections 2,054 and 2,056. And if the appellees at the date of the assignment had claims, not then bearing interest, which by their own lawful act were convertible into interest-bearing claims, the bank, by assigning, could not divest them of their right to do that act and put their demand in a more productive form.

Mr. Terry gets interest on his claim; folio 180.

4. Upon the fourth assignment, the appellees say that Mr. Terry's petition for an allowance for attorney's fees, and his own trouble and expense does not set forth with distinctness

what he claims under these several heads, or the grounds of the claim, (folio 248); that the court costs were allowed in the decree; that none of his solicitors asserted a lien on the fund, that the matter of fees to solicitors out of the fund is largely in the court's discretion, and the judges who had observed the whole course of this cause were the fittest persons to determine that question, and that this matter is not proper for consideration in the present appeal, it not being a several claim against these appellees.

A. T. AKERMAN,
For Appellees.